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In the Supreme Court of the United States

OCTOBER TERM 1968

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No. 305

CHARLES JOHN FUNK,
Petitioner,

vs.

DAVID K. FUNK, ARTHUR L. FUNK and ALBERT C. FUNK,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Arizona

Brief for Respondents in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1473

CHARLES JOHN FUNK,
Petitioner,

vs.

DAVID K. FUNK, ARTHUR L. FUNK and ALBERT C. FUNK,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Arizona

Brief for Respondents in Opposition

Respondents, David K. Funk, Arthur L. Funk and Albert C. Funk, present this Response in Opposition to the Petition for Writ of Certiorari filed herein by Petitioner, Charles John Funk.

OPINIONS BELOW

The Majority Report of Arbitrators, Arbitration Award and Dissent to Arbitration Award are unreported, but are set forth in the Petition (App. of Petition, pp. 1-34). The Judgment of the Superior Court of the State of Ari-

zona in and for the County of Maricopa on the Arbitration Award is unreported, but included in the Petition (App. of Petition, pp. 35-38).

The opinion of the Court of Appeals of Arizona (App. of Petition, pp. 39-48) is reported at 6 Ariz.App. 527, 434 P.2d 529 (1967). Denial of the Petition for Review of the decision of the Court of Appeals of Arizona by the Supreme Court of Arizona is unreported.

JURISDICTION

This Court does not have jurisdiction to grant a Writ of Certiorari in this case since the Petition was not filed within ninety days after the entry of an order denying the Petition for Review of the Arizona Court of Appeals' decision by the Supreme Court of Arizona. 28 U.S.C., § 2101(c). Otherwise, the jurisdictional requirements are set forth in the Petition, except jurisdiction of this Court must be invoked under 28 U.S.C., §1257(3) and not 28 U.S.C., § 1254(1).

QUESTION PRESENTED

The question presented for review is whether a partner in a family partnership who files a legal action asking for dissolution of the partnership and thereafter agrees to arbitrate is bound by the arbitration award, when Petitioner and his attorney agreed by stipulation, prior to the commencement of the arbitration proceeding, that the arbitrators could determine whether properties were partnership assets, and that the decision of the arbitrators could be filed in a court of general jurisdiction as a judgment in a pending legal action.

STATEMENT OF THE CASE

This litigation concerns the dissolution of a family partnership, pursuant to an arbitration clause in the partnership agreement, and an oral stipulation by the partners

through their legal representatives as to the scope of the submission to the arbitrators and the effect of an award.

In 1957, the parties hereto entered into a partnership agreement to conduct business under the name of Western Greyhound Racing Circuit. At approximately the same time Respondents, Arthur and David Funk, agreed to transfer to Petitioner by Bills of Sale stock and debentures in a corporation known as Greyhound Parks of Arizona, Inc. and stock in Washington Land Company, a corporation. Both corporations were to be owned and operated by the newly organized partnership.

Dispute arose among the partners, and Petitioner filed an action in the Superior Court of the State of Arizona in and for Maricopa County to dissolve the partnership. The partners thereafter agreed to arbitrate their differences pursuant to the partnership agreement.

Prior to receiving evidence at the arbitration hearing the following discussion and exchange transpired:

> "MR. BAYHAM (Petitioner's attorney): I will be willing to sign any agreement executed jointly by myself and Mr. Primock (Respondents' attorney) to the effect we will abide by the decisions of the arbitrators in connection with this arbitration, and if you decide an asset is a partnership asset, that that is it, it is a partnership asset. On the other side, if you decide it isn't a partnership asset, he has to agree it is not a partnership asset, it is a two-edged sword.
>
> "MR. PRIMOCK (Respondents' attorney): I will abide by your decision . . . We were under the opinion that the arbitration was to determine what was in the lawsuit (that litigation begun by the Petitioner to force dissolution), the value to give John what he prayed for in the lawsuit, plus the co-partnership agreement and plus the December 21 letter they signed. If you find under this agreement he doesn't have to sell it (the

stocks and debenture bonds received by the Petitioner under previously executed bills of sale), we will abide by it. * * *

"MR. SULLIVAN (One of the arbitrators): What do you care whether it is in debentures or into bucks.

"CHARLES JOHN FUNK: I go along if you decide it is a partnership asset.

* * * * * * * *

"MR. ELSING (One of the arbitrators): Would this be satisfactory to have a stipulation you go ahead and submit your case and any award we make can be filed in the Superior Court as a judgment?

"MR. BAYHAM: I would accept that.

"MR. PRIMOCK: With no ifs, ands or buts?

"MR. BAYHAM: I accept it the same as if it were a judgment determining this matter.

"MR. PRIMOCK: I will go along with that. There is one question that bothers me, I intend to introduce evidence as to the three brothers, two brothers and a nephew (Respondents), getting rid of John (Petitioner) in his entirety, buying out of value of Greyhound Parks, Western Racing, Inc., Washington Land Company andsoforth. (sic) If this stipulation will cover all of that, I mean, the stipulation that you just gave if it is broad enough to cover all of what I am going to try to do—not that I may succeed, but if I try to do it and it is done, if it covers that, I am willing to do it. I want to end it for all times.

"MR. BAYHAM: Perhaps we would go farther and stipulate further that it can be filed as a judgment, the award could be as a judgment, in the action which has been mentioned.

"MR. PRIMOCK: I will go with that. The 129497, whatever award here is the judgment.

"MR. BAYHAM: So stipulated.

* * * * * * * *

"MR. PRIMOCK: * * * You would agree that if they decide John keep it, he gets to keep it, if they

decide he must sell it, they set the price and the terms?

"MR. BAYHAM: That is correct. * * *"

Reporter's Transcript of Arbitration, Volume IV, Sept. 17, 1962.

Petitioner's statement of the case creates the inference that he did not agree that the arbitration board was to determine whether or not the stock and debentures of Greyhound Parks of Arizona, and the stock of Washington Land Company were part of the partnership assets of Western Greyhound Racing Circuit.

We do not deem it appropriate at this juncture to burden the Court with a detailed analysis of the evidence. It is sufficient to read the above stipulation by the partners as to the scope of the submission, which answers in full Petitioner's latent contention.

ARGUMENT

This Court does not have jurisdiction to issue a Writ of Certiorari since the application was not within the statutory time period; no federal question was specially set up or claimed; and the decision of the lower court is based upon non-federal grounds.

The decision of the Court of Appeals of Arizona on the individual facts involved was manifestly correct. The decision of the lower court does not conflict with decisions of this Court nor with any Federal or State statute. The issue in the present case is uniquely narrow, and no amount of strained semantics can convert it into a case warranting review by this Court on certiorari.

This Court Has No Jurisdiction to Decide This Case

The Supreme Court of Arizona entered an order on February 20, 1968, denying Petitioner's Petition for Review of the Arizona Court of Appeals' decision in this case. Respondents were notified by Petitioner's counsel that this

case was docketed in the Supreme Court of the United States on May 27, 1968. Total number of days lapsed between the above two dates is ninety-seven (97).

A Writ of Certiorari designed to bring a judgment before this Court in a civil action for review must be taken or applied for within ninety (90) days after entry of judgment by the highest state court. 28 U.S.C., § 2101. A party may seek review of a decision of the Arizona Court of Appeals in the Supreme Court of Arizona by a Petition for Review filed in the Supreme Court of Arizona. Rule 47(b), Arizona Rules of the Supreme Court, effective January 1, 1965.

Where the Supreme Court of Arizona had jurisdiction to review the decision of the intermediate appellate court, and refused to do so, the time for filing the Petition for Certiorari in this Court runs from the date of the refusal to review by the highest State appellate court. *American Railway Exp. Co. v. Levee,* 263 U.S. 19.

More than 90 days elapsed from the time the Supreme Court of Arizona refused review to the date the Petition for Writ of Certiorari was filed in this Court, and the period for applying for Writ of Certiorari was not extended by a Justice of this Court. Petitioner's application for a Writ of Certiorari is out of time and should be denied for this reason.

A cursory examination of the decision by the Court of Appeals of Arizona clearly indicates there was no substantial federal question specially set up or claimed in the lower court, and, thus, this Court does not have jurisdiction to review the decision. 28 U.S.C., Section 1257(3); *Zucht v. King,* 260 U.S. 174. Any alleged substantial federal question claimed to be involved now is so devoid of merit as to be frivolous.

The function of a Writ of Certiorari is not to give the complaining party another opportunity. *Magnum Import Company v. Houbigant,* 262 U.S. 159. The singular reference in the record to claimed violation of a right under the United States Constitution is found in Petitioner's Motion in Opposition to the trial court entering judgment on the Arbitration Award. But this constitutional argument was not carried through to the state appellate court by Petitioner.

The lower court's failure to mention a constitutional issue was not an oversight, but was for want of proper presentation by Petitioner. Also, the failure of the Petitioner in this case to comply with Rule 23(1)(f) of the Rules of the Supreme Court of the United States seems to support the contention that a federal question was not raised in the state appellate courts.

The fact that a federal question was presented to the trial court is not sufficient. *Beck v. Washington,* 369 U. S. 541. The constitutional issue had to be pursued on appeal, since the Arizona law is clear that unless an issue is presented on appeal, the appellate tribunal will not consider other alleged errors. *Elerick v. Rocklin,* 102 Ariz. 78, 425 P.2d 103.

The decision by the Arizona Court of Appeals was not based upon federal grounds, even assuming a federal question was involved, as there are adequate and independent non-federal reasons for the result. *Fox Film Corp. v. Muller,* 296 U.S. 207. The touchstone of decision of the lower court is the law of arbitration and contract in that the arbitrators were given the power to determine whether assets were partnership or separate property by stipulation, and the principals agreed to abide by the award. This non-federal reason is adequate to support the state court judgment.

Petitioner is asking this Court for special dispensation and a complete reversal of long-established, well-engrained rules of constitutional law in attempting to have the decision reviewed even though totally devoid of constitutional issues. This case does not present an important federal question, as from its inception to its present posture, it was and is the determination of the value of a partner's interest in a family partnership, and whether certain assets were partnership property.

The Decision Below Is Clearly Correct

The mere mumbling that a decision of the Court of Appeals of Arizona conflicts with the due process of law and impairing the obligation of contracts clauses of the United States Constitution does not present adequate reasons to grant a Writ of Certiorari. There has been an utter failure by Petitioner to demonstrate how the decision of the lower court conflicts with provisions of the United States Constitution. No application of these constitutional protections was made to the facts of this case, and to solely focalize and rely upon magical phraseology as reason for reviewing the decision is unadulterated sophistry.

Even by taking unwarranted liberties with the record, Petitioner does not make constitutional issues reviewable by this Court. There is no citation to decided cases nor reference to statutes, Federal or State, as to how this case violates due process of law or impairs the obligation of a contract. The sheer assertion of conflict is nothing more than an expedient subjective conclusion, completely unfounded and unsupported by the facts. The lack of citation of conflicting authority, and the negative application of constitutional principles to the facts of this matter, only illustrate the totally unmeritorious declaration that in some ambiguous and speculative manner Petitioner's constitutional rights have been violated.

It is well-established that individual property rights are protected by the United States Constitution. Petitioner's reliance upon the case of *Dombrowski v. Eastland,* 387 U.S. 82, is, however, pellucidly misplaced. The holding of this Court in that case was that a sufficient factual dispute was present to negate the granting of summary judgment by the lower court as to acts by an attorney employed by the Internal Security Subcommittee of the Judiciary Committee of the United States Senate. The case is obviously based jurisdictionally on the Federal Civil Rights Act of 1871 as indicated in its parent case, *Dombrowski v. Pfister,* 380 U.S. 479. The holding in the former case is completely out of point since it has nothing to do with individual property rights. The Fourth Amendment right to be free from "unreasonable searches and seizures" was involved, and the cited cases involve a Federally created statutory right of civil action for violation thereof.

Contrary to Petitioner's suggestion that the decision conflicts with other decisions of this Court, an examination of cases decided by this Court, regarding the subject of arbitration, reveals that the decision below follows general principles of arbitration, not only relied upon by this Court, but other State and Federal courts in the United States as well.

As early as 1870, this Court in the case of *Smith v. Morse,* 9 Wall. 76, stated:

> "... So the agreement to submit the matter to arbitrators, and to an umpire, if needful, carried with it the further agreement to abide the award which they might render, or, in case of their disagreement, which he might render. The law implies an agreement to abide the result of an arbitration from the fact of submission."

This Court has expounded other principles regarding arbitration which are applicable in the instant case. Judicial review of an arbitration award is much more narrow than judicial review of a trial, *Wilko v. Swan*, 346 U.S. 427; and, since arbitrators do not have judicial instructions on law available to them, they do not have to give reasons for their decisions. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198. Where parties mutually agree to be bound by the decision of arbitrators, such an agreement is binding on the parties to the extent agreed upon. *Gordon v. United States*, 7 Wall. 188.

The submission of a claim to arbitration may be pursuant to an agreement, and the principles of common law are applicable since arbitration does not have to result from statute or rule of court. The submission is an agreement, and assuming capacity to contract, the law governing contracts is applicable. *District of Columbia v. Bailey*, 171 U.S. 161.

It is no longer an open question that where parties agree to submit a controversy to arbitration and explicitly delineate the matters subject to arbitration by a submission agreement, the decision by the arbiters, absent fraud, corruption, or gross mistake, is binding. *Marine Transit Corporation v. Dreyfus*, 284 U.S. 263; *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109; *United States v. Justice*, 14 Wall. 535.

It is impossible to escape the conclusion, after reading the quoted stipulation agreed to by Petitioner's counsel, that the course of action presently being pursued by Petitioner is not the result of an afterthought.

This case involves essentially the construction of the declaration of submission to the arbitrators by the parties. Petitioner's contention that the stocks and bonds were

separate, non-partnership assets is totally refuted by the record. The character of the stocks and bonds was the precise subject of arbitration. It was the duty of the arbitrators to ascertain whether these assets were encompassed in the family partnership to such an extent as to make it impossible or impractical to effectively separate them from other partnership assets. This is what occurred; the award was within the scope of the submission; and, as such, the decision of the arbitrators is final, not reviewable by the judiciary for mistakes, either of law or of fact, absent fraud, collusion or plain error. *Cf. The N. Y. and Cumberland Railroad Co. v. Myers*, 18 How. 246.

Petitioner would have this Court grant his Petition for a Writ of Certiorari on the premise that the decision is of major significance in the administration of arbitration proceedings and that society has a substantial right involved or interest in the outcome thereof. Again, a bold generalization is asserted which cannot withstand scrutiny and minimal examination.

This court has often stated that it will not grant a Writ of Certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220. The issues decided by the arbitrators were factual determinations of whether the stocks and bonds owned by the parties were partnership assets; the value of Petitioner's share of the stocks and bonds of the corporations; and the value of Petitioner's partnership interest. It is equally clear that the judgment of the arbitrators is confined to the limited arbitration proceedings between the parties hereto, and the Court of Appeals of Arizona found that Petitioner had agreed to submit the ownership of the stocks and bonds to the arbitrators; had agreed by stipulation that the arbitration award could be entered as a judgment; and had agreed to abide by the

arbitration award. The issue of fraud was considered by the Court of Appeals of Arizona and not found present in this case since Petitioner had not shown with specificity those acts constituting fraud. It is difficult to imagine how the peripheral and particular set of facts involved in this case will arise in many arbitration proceedings in the United States.

The limited issue decided in this case is not converted into a burning social question by the injection of all arbitration proceedings into the argument, and does not transform a correct decision in a simple arbitration case into an important question of national interest.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Date: June 24, 1968

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